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No. 03-1273

Supreme Court, U.S.
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In The
Supreme Court of the United States

THOMAS J. SPARGO, JANE MCNALLY, and PETER KERMANI,

Petitioners,

v.

NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT, GERALD STERN, Individually and as Administrator of the State Commission on Judicial Conduct and HENRY T. BERGER, Individually and as Chairperson of the New York State Commission on Judicial Conduct,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF TO BRIEF IN OPPOSITION

DAVID F. KUNZ
Counsel of Record
GEORGE J. SZARY
Attorneys for Petitioners

DEGRAFF, FOY, KUNZ & DEVINE, LLP
90 State Street
Albany, New York 12207
(518) 462-5300

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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PRELIMINARY STATEMENT

This Reply Brief is respectfully submitted on behalf of Petitioners Thomas J. Spargo, Jane McNally, and Peter Kermani in further support of their Petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on December 9, 2003.

By erroneously holding the claims of the Petitioners to be "unavoidably intertwined and inseparable", the Second Circuit Court of Appeals made a determination in stark conflict with numerous other circuits and Supreme Court precedent on the issue of *Younger* abstention. Before making such a finding, this Court, as well as numerous circuits which have passed on the question, requires a relationship of "ownership, control, and management" *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 929 (1975), or "an identity of economic activities and interests", *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Board of Higher Education*, 654 F.2d 868, 878 (3d Cir. 1981). Such a relationship has not and cannot be demonstrated among the Petitioners in this matter.

Not only was *Younger* abstention improper due to the complete and undeniable inability of Petitioners McNally and Kermani to participate in the challenged state administrative proceeding being pressed against Justice Spargo, abstention should not have been invoked as the challenged provisions of the New York State Rules of Judicial Conduct ("Code") were flagrantly unconstitutional, based not only on the recent opinion of the Supreme Court in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), but

through a well-established body of First Amendment precedent.

This matter places squarely before the Supreme Court significant questions of law ripe for review, and the Petition for certiorari should be granted.

I. PETITIONERS HAVE DEMONSTRATED A CLEAR CONFLICT BETWEEN THE SECOND CIRCUIT AND WELL-ESTABLISHED PRECEDENT FROM THIS COURT AND OTHER COURTS

The Respondents have failed to cite a single case to support the position adopted by the Second Circuit's holding in *Spargo v. N.Y. State Comm'n on Judicial Conduct,* 351 F.2d 65 (2d Cir. 2003), or to demonstrate that the decision does not clearly diverge from existing precedent of the Supreme Court of the United States and other circuits on the subject of *Younger* abstention as it relates to non-parties to the challenged state proceeding. They have failed to cite a single case, and no such case exists, where *Younger* abstention was deemed appropriate and access to a federal forum denied to a litigant not party to a pending state proceeding, or unable to participate in that proceeding, or where a non-party did not have some relationship of privity or one approaching privity with a party to the state action. This failure is fatal to their position.

Contrary to the Respondents' contention, the Second Circuit *Spargo* decision did not "faithfully appl[y]" the precedent from this Court's decision in *Doran v. Salem Inn, Inc.,* 422 U.S. 922 (1975), and *Hicks v. Miranda*, 422 U.S. 332 (1975). (Brief in Opposition, p. 8) In each of those

cases, a relationship of privity or one approaching privity existed, and the non-parties against whom abstention was invoked had some present ability to participate in the state proceeding. (*See,* Petition for Certiorari, pp. 7-21) In *Spargo*, this is simply not so.

Not only were Kermani and McNally not party to the state administrative proceeding, they were barred from participating in that process. Neither *Doran* nor *Hicks* can be cited to support the proposition that *Younger* abstention applies where the federal litigants were foreclosed from access to the state proceeding.

> As the Supreme Court made clear in *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), where the plaintiff in a federal action is not a party to the state proceeding, *Younger* concerns about federal adjudication do not arise.

Sullivan v. The City of Pittsburgh, 811 F.2d 171, 177 (3d Cir. 1987), *cert. denied*, 484 U.S. 849 (1987). Therein rests the fundamental flaw in the *Spargo* decision and the Respondents' opposition to certiorari.

The contention by Respondents that the relationship relied upon by the Second Circuit in abstaining "resembles the third-party claims in *Hicks*," (Brief in Opposition p. 8) is simply incorrect, and ignores critical factors present in the *Hicks* case demonstrating that a legally cognizable relationship existed between the non-parties and the parties to the state proceeding. Specifically, the non-parties employed the parties to the state proceeding. Moreover, the non-parties could seek recourse in the pending state proceeding. *Hicks*, 422 U.S. 348-49. To suggest that Kermani and McNally's relationship with

Spargo resembles the relationship among those in the *Hicks* matter is to ignore the relevant facts.

The attempts of the Respondents to reconcile the *Spargo* decision with decisions cited by Petitioners from the First, Third, Fifth, Eighth, and Ninth Circuits can best be characterized as sophistry, again accomplished only by ignoring critical aspects of each case. As discussed at length in the Petition, each of those cases held that "legally distinct parties . . . " would not be subject to the prohibitions to federal relief imposed by *Younger*. *Casa Marie v. Superior Court of Puerto Rico*, 988 F.2d 252, 267-68 (1st Cir. 1993); *Petition for Certiorari*, pp. 7-21. There is no sound basis to assert that the Petitioners are other than "legally distinct parties."

In fact, the Third Circuit decision of *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Board of Higher Education*, 654 F.2d 868 (3d Cir. 1981), and the subsequent Third Circuit decision of *Sullivan v. The City of Pittsburgh*, 811 F.2d 171 (3d Cir. 1987), specifically interpreted the *Doran* holding as requiring unitary treatment of parties for *Younger* purposes only where federal plaintiffs are closely related to state defendants in terms of "ownership, control and management," *New Jersey-Philadelphia Presbytery*, 654 F.2d at 878, or where there existed "an identity of economic activities and interests." *Id.; Sullivan v. The City of Pittsburgh*, 811 F.2d at 177-78.

The only new case cited by the Respondents in their brief in opposition, *Women's Community Health Center of Beaumont, Inc. v. Texas Health Facilities Commission*, 685 F.2d 974 (5th Cir. 1982), does nothing to contradict the proof set forth in the Petition that a conflict among the

circuits has been created by the Second Circuit's decision in *Spargo*. Rather, a close reading reveals that the case is consistent with Petitioners' position that abstention requires some relationship of privity as well as the ability to meaningfully participate in the state proceeding.

In *Women's Community Health Center*, doctors and patients joined with a health center in an action arising from a challenge to denial of certification to the center pursuant to Texas' Health Planning Act. These doctors and patients worked or were seeking treatment at the Center. These plaintiffs also filed a suit in state court to review the denial of the certificate to the particular center. *Id.* at 977.

Moreover, the doctors and patients asserted no rights or claims distinct from the rights of that particular Center. They challenged the denial of the certification for that facility in that single instance; they did not challenge an independent basis or right to receive a particular type of medical services, in this matter abortion:

> The plaintiff women do not allege that the state might interfere with their ability to obtain an abortion anywhere but at the Center; the plaintiff doctors did not allege that the state might interfere with their ability to perform abortions anywhere but at the Center. The only relief requested is an order for the continued operation of the Center.

Women's Community Health Center, Inc., 685 F.2d at 982. Thus, the claim of the doctors and patients were identical to those of the Center.

This draws a clear distinction from the issues raised by the Petition where McNally and Kermani are independent parties, with independent claims, seeking to protect independent constitutional rights and freedom, regardless of Justice Spargo, as noted by the District Court. (App. p. 75).

The efforts to reconcile the *Spargo* decision with the various decisions from other circuits fail. The case upon which Respondents seem to heavily rely, *Women's Community Health Center, Inc.*, supports a grant of certiorari, serving only to highlight that the Second Circuit decision in *Spargo* was out of step with precedent on this issue.

II. THE CODE'S UNCONSTITUTIONALITY IS MANIFEST

The Respondents begin their opposition by misstating that "Spargo does not contest the Second Circuit's decision to abstain from adjudicating his own constitutional claims . . . " (Brief in Opposition at p. 1) Quite to the contrary, Justice Spargo clearly objects to abstention as to his claims for it was improper given the flagrant unconstitutionality of the Code. This is clearly articulated in the second Question Presented for review in the Petition for Certiorari and the nine page discussion of the Code's fundamental constitutional shortcomings of Point II.

It is submitted the Respondents wish to divert attention from consideration of the Code's constitutionality, as they are without sound legal arguments to support their position. The perfunctory manner in which the Respondents address the critical issue of the facial unconstitutionality of the Code in their opposition speaks loudly to this point. (*See,* Brief in Opposition pp. 16-17) Conspicuous by its

absence is any mention or discussion of the lengthy decision from the Northern District by Judge Hurd and the litany of First Amendment precedent cited therein demonstrating the facial constitutional invalidity of the challenged Code provisions. (App. pp. 83-84).

The flagrant unconstitutionality of the Code and its direct conflict with this Court's recent decision in *Republican Party of Minnesota v. White* are fully briefed in the Petition and will not be repeated here. (*See*, *Petition for Certiorari*, pp. 21-30)

III. THIS CASE PRESENTS A LEGAL QUESTION RIPE FOR REVIEW, SQUARELY PRESENTED TO THE SUPREME COURT

The Respondents, in a last gasp effort to avoid review of the flawed Second Circuit decision protest this case is a "poor vehicle" to revisit the application of *Younger* abstention to non-parties. In doing so, they ignore not only the clear conflict created by the *Spargo* decision between the various circuits and precedent of this Court, but the equally compelling basis for review – the presentation of a question squarely left open by the Supreme Court in *Middlesex County Ethics Commission v. Garden State Bar Ass'n*, 457 U.S. 423 (1982). Contrary to the assertions in the Brief in Opposition, the Second Circuit itself, in deciding *Spargo*, acknowledged that *Middlesex County Ethics Commission* had expressly left open the question of the applicability of *Younger* to such as McNally and Kermani. (App. p. 32).

The Respondents also rely heavily on dicta in the Second Circuit decision questioning McNally and Kermani's standing, claiming the rights asserted are derivative of

rights held by Justice Spargo. (App. p. 37). The Second Circuit decision, however, did not decide standing (App. p. 37 n.19) and significantly the Respondents did not challenge the standing of McNally and Kermani to bring a direct constitutional claim. (App. p. 76 n.7). What Respondents ignore is that the District Court did reach the issue and did determine that McNally and Kermani had standing, raising separate and independent constitutional claims challenging the Code based on the First Amendment:

> . . . McNally and Kermani each assert individual claims that the challenged sections of the Rules chill their individual speech and association and are therefore unconstitutional. *See, Steffel v. Thompson*, 415 U.S. 452, 474-75, 94 S. Ct. 1209, 1223-24 (1974) (holding that on its face or as applied challenge will lie although there is no pending state court proceeding.) . . .
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> * * *
>
> Defendants have not challenged the standing of McNally and Kermani to bring a direct (as opposed to derivative) constitutional challenge to the specified Rules. Their facial challenge to the specified rules will lie since they have asserted that enforcement of the Rules has chilled their right to free speech and association. *See, id.*

(App. pp. 75-76, n.7).

Respondents also wish to make much of the Second Circuit's characterization of Kermani and McNally's claims of First Amendment infringement by the Code as "conclusory" and "speculative". This too is dicta, overlooking the District Court's determination that the two

asserted clear and distinct independent constitutional claims. (App. p. 75).

Also, it is critical to point out the posture of the case as it was decided by the District Court. The Record was comprised only of affidavits including those of McNally and Kermani, in support of the initial application for preliminary injunction. The District Court, however, consolidated trial on the merits with the preliminary injunction hearing under Federal Rule of Civil Procedure 65(a) maintaining the matter, at its core, constituted a facial attack on the Code's constitutionality determinable on the law. (App. pp. 58-59). Thus, there was no opportunity to expand the Record, as Petitioners were prepared to do, through testimony in open court. In any event, the District Court passed on the question and found facts sufficient to sustain that a separate and independent claim on the part of each existed. (App. p. 75).

In light of McNally and Kermani's claims, even the hypothetical scenario posited by the Respondents where charges against Justice Spargo based on non-challenged Code provisions are adjudicated before the Supreme Court hears the merits, would not serve to moot the case. In any event, even assuming that non-challenged charges were prosecuted to conclusion against Justice Spargo, the question would not be moot as it is clearly one encompassed in the exception to the mootness doctrine of a case "capable of repetition yet evading review." *Roe v. Wade*, 410 U.S. 113, 125 (1973).

It is submitted that the legal issues are clearly drawn, are of the type clearly within the ambit of this Court's review, and certiorari should be granted.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DAVID F. KUNZ, ESQ.
GEORGE J. SZARY, ESQ.
DEGRAFF, FOY, KUNZ &
DEVINE, LLP
90 State Street
Albany, New York 12208
(518) 462-5300
Attorneys for Petitioners
Thomas J. Spargo,
Jane McNalley, and Peter Kermani